

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1945

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**No. 640**

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DR. TOM H. ROBERTSON, M. D.,

*vs.*

*Petitioner,*

NEW YORK LIFE INSURANCE COMPANY, A NEW  
YORK STATE CORPORATION,

*Respondent*

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**PETITIONER'S SUPPORTING BRIEF**

**Statement Regarding Jurisdiction**

Petitioner contends that this Court has jurisdiction to review as upon an appeal by writ of certiorari the proceedings and summary judgment rendered by the Circuit Court for the County of Wayne which was affirmed by the Michigan Supreme Court, the Court of last resort in said State of Michigan for the following reasons:

**(A) Statutory Provision Believed to Sustain the  
Jurisdiction**

The Federal statute which gives this Court jurisdiction is section 237 of the Judicial Code, Title 28 U. S. C. A., 344 which provides:

“(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for

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(Figures in parentheses refer to pages of printed record, italics and capitals used in quoted matters are ours, unless the context clearly indicates otherwise.)

review and determination, \* \* \* any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question \* \* \* the validity of a statute of any State on the ground of its being repugnant to the Constitution, \* \* \* of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution \* \* \* of \* \* \* the United States \* \* \*”.

**(B) Michigan Statutes and Court Rules Validity of Which Is Involved**

The Michigan statutes involved are:

*Section 14260 of Michigan Compiled Laws of 1929, which provides:*

“At any time after any cause arising upon contract or judgment, or statute shall be at issue, upon motion of the *plaintiff*, after the usual notice to the defendant, supported by the affidavit of the plaintiff, or any one in his behalf having knowledge of the facts verifying the plaintiff’s cause of action, and stating the amount claimed, and his belief that there is no defense to the action, the court shall enter a judgment in favor of the plaintiff, unless the defendant shall prior to, or at the time of hearing said motion, make and file an affidavit of merits. Said affidavit of merits shall state whether or not the defense claimed therein applies to the whole of the plaintiff’s claim and if not, it shall state definitely what item or items of the plaintiff’s claim and the amount thereof is admitted.”

*Section 14263 of Michigan Compiled Laws of 1929, which provides:*

“All issues of law shall be tried by the court, and all the issues and questions of fact, shall be tried by the court, unless a jury be demanded by one of the parties, in a manner prescribed by the rules of the court: Provided, that in all actions of tort, and in all other

actions the subject matters whereof are, in the opinion of the court, peculiarly proper for the consideration of a jury, it shall be competent for the court to order the cause to be tried by a jury."

*Section 14471 of Mich. Compiled Laws of 1929, which provides:*

"In suits brought for the recovery of damages for libel or slander in this state, the plaintiff shall be entitled to recover only such actual damages as he may have suffered in respect to his property, business, trade, profession, occupation or feelings."

*Section 14472 of Mich. Compiled Laws of 1929, which provides:*

" \* \* \* Jury shall in all cases specify the amount awarded for damages to feelings separately from the amount awarded for other damages mentioned in the foregoing section."

*Michigan Public Act No. 327 of 1931, section 11, as amended by section 1 of Act No. 194 of 1935, which provides:*

"The plea of *ultra vires* shall not be made by any foreign corporation or any other party in any action brought in this state \* \* \*."

*Michigan Court Rule 30, section 7, which provides:*

"In any action at law, the defendant may, after issue is joined, move the court for entry of judgment in his favor upon a showing by affidavits or depositions filed in the cause that there is no question of fact to be determined by the court or jury and that he is entitled to a judgment in his favor. Before judgment is entered the plaintiff shall be given a reasonable opportunity to obtain and file affidavits and depositions controverting the facts set forth in the affidavits or depositions filed by the defendant. EITHER PARTY SHALL BE GIVEN THE FURTHER OPPORTUNITY TO CROSS-EXAMINE WITNESSES WHOSE AFFIDAVITS HAVE BEEN FILED OR WHOSE DEPOSITIONS HAVE BEEN TAKEN WITHOUT AFFORDING SUCH

OPPORTUNITY OF CROSS-EXAMINATION. FACTS SET FORTH IN SUCH AFFIDAVITS OR DEPOSITIONS, WHICH IT APPEARS THE WITNESSES COULD NOT TESTIFY TO UNDER THE RULES OF EVIDENCE PRESCRIBED BY LAW SHALL NOT BE CONSIDERED. If it appears to the court from such affidavits and depositions that the defendant is entitled to a judgment as a matter of law, WITHOUT DECIDING ANY CONTROVERTED ISSUE OF FACT the court shall enter such judgment, and the plaintiff may appeal therefrom. BOTH PLAINTIFF AND DEFENDANT ARE TO HAVE AN EQUAL RIGHT TO A SUMMARY JUDGMENT, UPON PROPER PROOFS."

*Michigan Court Rules 40 and 41* which provide for the taking of depositions by either party in order to plead or prepare for trial of the case.

#### **(C) Date of Judgment Sought To Be Reviewed**

The Opinion of the Michigan Supreme Court was filed June 29, 1945; Petitioner filed his Petition for a Rehearing on or about July 15, 1945, and the order denying said Petition for Rehearing was made September 5, 1945.

#### **(D) Date upon Which Application for Appeal Is Presented**

This Petition for Certiorari is presented on the — day of December, A. D., 1945.

#### **NATURE OF CASE**

This is a case where the Michigan Supreme Court, which is the court of last resort of the State, decided:

"Under facts and circumstances shown by the record, the granting of the summary judgment did not deprive plaintiff (Petitioner) of due process of law or of other constitutional rights. *Peoples Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273."

In so holding, the Michigan Supreme Court decided Federal questions of substance not theretofore determined by this Court.

Petitioner contends that the summary judgment rendered for Respondent as shown by the certified transcript of the proceedings in the Michigan Courts violates the provisions of the U. S. Constitution in the following particulars, viz:

PETITIONER HAS BEEN DEPRIVED OF HIS RIGHT TO A JURY TRIAL;

PETITIONER HAS BEEN DENIED HIS RIGHT TO A FULL AND COMPLETE HEARING ON ALL OF THE ISSUES;

PETITIONER HAS BEEN DENIED HIS RIGHT TO "DUE PROCESS OF LAW";

PETITIONER HAS BEEN DENIED HIS RIGHT TO "EQUAL APPLICATION AND PROTECTION OF LAW".

# I

## **Petitioner Has Been Deprived of His Right to a Jury Trial**

In the case of *Diversey Liquidating Corporation v. Neunkirchen*, 370 Ill. 523, 19 N. E. 2d, 363, annotated in 120 A. L. R. 1395, it was held that the Court Rule concerning summary judgments which permitted the trial court to determine the truth of defendant's affidavit of meritorious defense by means of other affidavits and oral examination of the parties and other affiants, was unconstitutional because it deprived the defendant of his constitutional right to a trial by jury, and a similar situation exists in the case at bar.

In the *Diversey* case, the Illinois Supreme Court stated:

"The purpose of a proceeding for summary judgment is to determine whether a defense exists. Where a defense raises an issue of fact as to plaintiff's right to recover is set up, a summary judgment must be denied. To try an issue of fact by affidavits WOULD DEPRIVE DEFENDANT OF HIS RIGHT TO A JURY TRIAL. \* \* \*

"The credibility of witnesses is to be determined by the jury in common law actions. Ill. Central R. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341; see Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914 D, 1029. \* \* \*

"The rule must be held invalid, since it authorizes the court to pass upon the truth of his defense thus depriving him of rights guaranteed by sec. 5 of art. 2 of the Illinois constitution, Smith-Hurd Statutes. \* \* \*

"The court cannot determine the truth of defendant's affidavit of merits in a summary judgment proceeding. The truth or falsity of facts disclosing a legal defense must be DECIDED BY A JURY."

*Diversey Liquidating Corp. v. Neunkirchen*, 370 Ill. 523.

A court Rule which denies a litigant of a constitutional right must be declared void:

Ruling Case Law, Title "Courts", Sec. 51. American Jurisprudence, Title "Courts", Sec. 152.

## II

### **Petitioner Has Been Denied His Right to a Full and Complete Hearing on All of the Issues**

It is axiomatic in American jurisprudence that every person is entitled to his day in court when his rights and property are involved, and Petitioner contends that he was not accorded a full and complete hearing in the case at bar in the Michigan Courts. He requested permission to take depositions of the several defendants, to assist the Court in arriving at the truth, but his request was denied repeatedly. The affidavits filed by Respondent upon which its motion for summary judgment is based are mere legal conclusions of law and no facts are stated therein. For the affiants to swear that the Respondent corporation did not

authorize and did not ratify the conspiracy and slander is to state a mere legal conclusion, unsupported by any FACTS. Petitioner should be granted his day in court to prove his case.

“A sentence of a court pronounced against a party without hearing him, or GIVING HIM AN OPPORTUNITY TO BE HEARD IS NOT A JUDICIAL DETERMINATION OF HIS RIGHTS.”

*Windsor v. McVeigh*, 93 U. S. 274-277, 23 L. Ed. 914.

### III

#### **Petitioner Has Been Denied His Right to “Due Process of Law”**

Petitioner's rights and property as a medical doctor have been trampled upon by Respondent and he is entitled to redress according to “due process of law”.

It is well established that a man's business, occupation, PROFESSION OR CALLING is his property and is protected and guaranteed by the Constitution of the United States:

*Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394.

“The term ‘due process of law’ when applied to judicial proceedings means a course of legal proceedings ACCORDING TO THOSE RULES AND PRINCIPLES WHICH HAVE BEEN ESTABLISHED BY OUR SYSTEM OF JURISPRUDENCE FOR THE PROTECTION AND ENFORCEMENT OF PRIVATE RIGHTS.”

*Pennoyer v. Neff*, 95 U. S. 679, 24 L. Ed. 565.

The Michigan statute and Court Rule 30, section 7, must be construed and administered within the U. S. Constitutional limitations:

“Since a law may be unconstitutional because of the MANNER IN WHICH IT IS BEING ADMINISTERED, a federal question may be involved on an appeal, based not on a state law as written, BUT AS ADMINISTERED.”

*Myles Salt Co. v. Iberia, etc., Drainage District*, 239 U. S. 478.

The Michigan Courts have administered section 14260 of Michigan Compiled Laws of 1929 and section 7 of Michigan Court Rule 30 in such a way as to violate the Federal Constitutional limitations. Section 14260 applies only to motions for summary judgment on behalf of a PLAINTIFF, and furnish no authority for a motion for a summary judgment by Respondent in the case at bar.

#### IV

#### **Petitioner Has Been Denied His Right to "Equal Application and Protection of the Law"**

The summary judgment rendered against Plaintiff and in favor of Respondent and its affirmance by the court of last resort of Michigan constitutes a denial of the "Equal Application and Protection of the Law" guaranteed by the U. S. Constitution.

"By 'denial of equal protection of the laws' under the Federal Constitution, is meant to refuse to grant or to withhold EQUAL TREATMENT in conferring or securing rights or imposing or exacting performance of duties, intentionally to treat differently or to DISCRIMINATE in so doing. (Syl. 7).

"The 'equal protection of the laws' provision of the Fourteenth Amendment extends to each department of the state government in the exercise of its special functions, and to those who represent the state as officers or agents." (Syl. 3).

*Louisville & Nashville R. R. Co. v. Bosworth*, 230 Fed. 191.

Respectfully submitted,

DR. TOM H. ROBERTSON, M. D.,  
*Petitioner, Pro Se.*